

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEVEN JAJUAN BROWN,

Defendant-Appellant.

UNPUBLISHED

March 23, 2006

No. 256188

Wayne Circuit Court

LC No. 04-001337-01

Before: Owens, P.J., and Kelly and Fort Hood, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of felonious assault, MCL 750.82. He was sentenced to one and one-half years' probation. Defendant appeals as of right, and we affirm.

Defendant first argues that there was insufficient evidence to support the conviction. We disagree. In reviewing the sufficiency of the evidence, this Court must view the evidence de novo. *People v Lueth*, 253 Mich App 670, 680; 660 NW2d 322 (2002). This Court reviews the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005).

"The elements of felonious assault are (1) an assault, (2) with a dangerous weapon, and (3) with the intent to injure or place the victim in reasonable apprehension of an immediate battery." *People v Avant*, 235 Mich App 499, 505; 597 NW2d 864 (1999). An assault is defined as "either an attempt to commit a battery or an unlawful act which places another in reasonable apprehension of receiving an immediate battery." *People v Grant*, 211 Mich App 200, 202; 535 NW2d 581 (1995). A battery is "an intentional, unconsented and harmful or offensive touching of the person of another, or of something closely connected with the person." *People v Nickens*, 470 Mich 622, 628; 685 NW2d 657 (2004). Circumstantial evidence is sufficient to establish a defendant's intent. *People v Reeves*, 458 Mich 236, 244; 580 NW2d 433 (1998).

Under an aiding and abetting theory, one who counsels, procures, aids, or abets in the commission of an offense may be convicted and punished as if he directly committed the offense. MCL 767.39; *People v Mass*, 464 Mich 615, 627-628; 628 NW2d 540 (2001). "A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed

acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement.” *People v Smielewski*, 235 Mich App 196, 207; 596 NW2d 636 (1999).

Review of the record reveals that there was sufficient evidence to convict defendant of felonious assault based on an aiding and abetting theory. Defendant had a conversation with the victim about marijuana. Defendant entered the victim’s vehicle with an unidentified man (“the shooter”). While the victim wrestled with the shooter, defendant tried to steal the victim’s money, marijuana, and cellular telephone. When the shooter was unable to subdue the victim, defendant joined in the assault by trying to burn the victim with a cigarette. Defendant told the shooter that it was time to leave, and the shooter turned as he left the vehicle, shooting the victim. Based on these facts viewed in the light most favorable to the prosecution, there was sufficient evidence to convict defendant of felonious assault. *Tombs, supra*.

We note that defendant’s brief on appeal does not make issue of the individual elements of the charged offense and the elements of the convicted offense, but rather challenges the credibility of the victim and his identification of defendant as the perpetrator. However, the credibility of the victim and his identification¹ was resolved by the trier of fact in favor of the prosecution. We will not interfere with the trier of fact’s role of determining the weight of the evidence or the credibility of the witnesses. *People v Mehall*, 454 Mich 1, 6; 557 NW2d 110 (1997). All conflicts in the evidence must be resolved in favor of the prosecution when presented with a challenge to the sufficiency of the evidence. *People v Terry*, 224 Mich App 447, 452; 569 NW2d 641 (1997). The conflicts in the victim’s trial testimony and preliminary examination testimony was raised at trial. The victim explained any disparity in his testimony, and the trial court found him credible. Accordingly, the defense challenge on this basis is without merit.

Defendant next argues on several different grounds that he was denied the effective assistance of counsel at trial. We disagree. This Court previously remanded this case to the trial court for an evidentiary hearing to determine whether defendant was denied the effective assistance of counsel. The trial court conducted a *Ginther*² hearing and subsequently denied defendant’s motion to set aside defendant’s conviction. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court’s factual findings for clear error, and its constitutional determinations de novo. *Id.*

¹ In the defense brief on appeal, the issue of pre-trial identification and line-ups is raised. However, the victim testified that he recognized defendant at the car wash, called police, and identified defendant at the car wash. There is no indication that a line-up was conducted at the trial level, and appellate counsel did not present evidence at the evidentiary hearing held following trial.

² *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).

Effective assistance of counsel is presumed and defendant bears a heavy burden to prove otherwise. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). To prevail on a claim of ineffective assistance of counsel, a defendant must show that: (1) counsel's performance fell below an objective standard of reasonableness; and (2) but for defense counsel's errors, there is a reasonable probability that the result of the proceeding would have been different. *People v Carbin*, 463 Mich 590, 599-600; 623 NW2d 884 (2001). A defendant must also overcome the presumption that the challenged action might be considered sound trial strategy. *People v LaVearn*, 448 Mich 207, 216; 528 NW2d 721 (1995).

Defendant first argues that he was denied the effective assistance of counsel because defense counsel failed to make an opening statement. Waiver of an opening statement is a "subjective judgment[] on the part of trial counsel which can rarely, if ever, be the basis of a successful claim of ineffective assistance of counsel." *People v Pawelczak*, 125 Mich App 231, 242; 336 NW2d 453 (1983). Where defense counsel gives a complete closing argument and is given a full and fair opportunity to comment on the case and the evidence, prejudice cannot be shown by the lack of an opening statement. See *People v Buck*, 197 Mich App 404, 413-414; 496 NW2d 321 (1992), rev'd in part on other grounds sub num *People v Holcomb*, 444 Mich 853; 508 NW2d 502 (1993).

Here, defense counsel reserved his opening statement at the beginning of defendant's bench trial, and the prosecutor waived his opening statement without objection. At the close of the prosecution's proofs, defense counsel indicated that he would "rest," and did not call any witnesses or present any evidence to rebut the prosecution's case. Defense counsel proceeded to give a closing argument, highlighting the weaknesses and contradictions in McDaniel's testimony regarding his identification of defendant. The trial court heard defense counsel's complete closing argument before ruling on the case. We conclude that defendant failed to show how defense counsel's failure to give an opening statement fell below an objective standard of reasonableness or how it affected the outcome of defendant's case. *Carbin, supra*.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to move for a directed verdict on the armed robbery charge at the close of the prosecution's case. In determining whether to grant a motion for directed verdict, "a trial court must consider the evidence presented by the prosecution to the time the motion is made." *People v Riley (After Remand)*, 468 Mich 135, 139-140; 659 NW2d 611 (2003). The trial court views the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could have found that the essential elements of the crime were proved beyond a reasonable doubt. *Id.* The charge in the information was armed robbery. "The elements of armed robbery are: (1) an assault, (2) a felonious taking of property from the victim's presence or person, (3) while the defendant is armed with a weapon described in the statute [MCL 750.529]." *People v Carines*, 460 Mich, 750, 757; 597 NW2d 130 (1999). "A conviction of aiding and abetting requires proof of the following elements: (1) the underlying crime was committed by either the defendant or some other person, (2) the defendant performed acts or gave encouragement that aided and assisted the commission of the crime, and (3) the defendant intended the commission of the crime or had knowledge that the principal intended its commission at the time of giving aid or encouragement." *Smielewski, supra*.

Here, the prosecution presented sufficient evidence that a rational trier of fact could have concluded that defendant aided and abetted an armed robbery. The prosecution presented

sufficient evidence that a rational trier of fact could conclude that defendant assisted the shooter in the assault. The victim testified that defendant searched him for valuables while he wrestled with the shooter. The men entered the victim's vehicle and acted in concert. Further, to convict a defendant of armed robbery the fact-finder must make the determination that the assailant was in fact armed with a dangerous weapon, such as a gun. *People v Banks*, 454 Mich 469, 472-473; 563 NW2d 200 (1997), citing *People v Parker*, 417 Mich 556, 565; 339 NW2d 455 (1983). The victim testified that the shooter had a gun pointed at him and that defendant assisted the shooter in obtaining possession and control of the gun.

Viewing the evidence in a light most favorable to the prosecution, a rational trier of fact could have found the elements of aiding and abetting an armed robbery were proven beyond a reasonable doubt. *Riley (After Remand)*, *supra*. Thus, a motion for a directed verdict by defense counsel would not have been successful. "Ineffective assistance of counsel cannot be predicated on the failure to make a frivolous or meritless motion." *Id.* Accordingly, defense counsel's failure to move for a directed verdict did not fall below an objective standard of reasonableness and defendant has failed to show that a reasonable probability existed that the outcome of his case would have been different had defense counsel moved for a directed verdict. *Carbin*, *supra*.

Defendant next argues that he was denied the effective assistance of counsel because defense counsel failed to call two available alibi witnesses. Trial counsel's failure to call a particular witness is presumed to be trial strategy. *People v Mitchell*, 454 Mich 145, 163; 560 NW2d 600 (1997). This Court will not second-guess a trial counsel's decision to call or question a witness with the benefit of hindsight. *People v Dixon*, 263 Mich App 393, 398; 668 NW2d 308 (2004). "The failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense." *Id.*

Here, the record demonstrates that defense counsel was aware of both alibi witnesses and interviewed each prior to trial. After a mock cross-examination of each witness prior to trial, defense counsel determined that their testimony was inconsistent and potentially damaging to defendant's case. Defense counsel testified at the evidentiary hearing that his strategy was to attack the weaknesses and contradictions in the victim's testimony, show that no physical evidence linked defendant to the scene of the shooting, and argue that the victim was unworthy of belief. The record reveals this is exactly what defense counsel did. The record indicates that defense counsel effectively cross-examined the victim regarding his identification of defendant, brought out numerous contradictions and, in closing argument, argued that the trial court should discredit the victim's identification testimony. In doing so, defense counsel succeeded in convincing the trial court to find defendant not guilty of armed robbery. Therefore, defendant has failed to show that defense counsel's performance fell below an objective standard of reasonableness and he has failed to overcome the presumption that defense counsel's failure to call the alibi witnesses was trial strategy. *Carbin*, *supra*; *Mitchell*, *supra*.

Finally, defendant argues that he was denied the effective assistance of counsel because defense counsel failed to inform defendant of his right to testify and because defense counsel failed to call defendant as a witness to support his alibi defense. At the evidentiary hearing, the

trial court concluded that defendant was aware that he had the ability to testify in his own defense. We note that defendant's testimony at the evidentiary hearing, that he was unaware he could testify in his own defense,³ is contradictory to his affidavit in which he indicated that he planned on taking the witness stand at trial. Further, defendant's affidavit is consistent with defense counsel's testimony that he informed defendant of this option to testify prior to trial because defendant indicated in his affidavit that he "planned" to testify at trial. Therefore, the trial court's finding that defendant was aware that he had the ability to testify was not clearly erroneous. *LeBlanc, supra*.

Furthermore, advising a defendant on whether to testify on his own behalf is a matter of trial strategy that this Court will not second-guess on appeal. *People v Tammolino*, 187 Mich App 14, 17; 466 NW2d 315 (1991). If a defendant decides not to testify or acquiesces in his attorney's decision that he not testify, the right to testify is deemed waived. *People v Simmons*, 140 Mich App 681, 684-685; 364 NW2d 783 (1985). Defense counsel testified that his strategy at trial was to attack the victim's eyewitness testimony and argue that the prosecution failed to prove the elements of the charged crime beyond a reasonable doubt. Defense counsel also testified that he gave defendant the option to testify at trial at the close of the prosecution's proofs and that defendant chose not to do so. Accordingly, defendant has failed to overcome the presumption that defense counsel's performance was not sound trial strategy, *Mitchell, supra*; *Tammolino, supra*, or that defense counsel's performance fell below an objective standard of reasonableness, *Carbin, supra*.

Affirmed.

/s/ Donald S. Owens
/s/ Kirsten Frank Kelly
/s/ Karen M. Fort Hood

³ We also note that defendant testified at the Ginther hearing that trial counsel consulted with him throughout the trial. He testified that trial counsel indicated that he would not call alibi witnesses, and defendant agreed with that decision.